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Supreme Court, U.S.
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No. 96-1824

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

GARY LEE, M.D., et al.,
Petitioners,

v.

F. DOUGLASS HARCLEROAD, et al.,
Respondents,

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION
filed by
RESPONDENTS LEVIN, M.D., AND SHUCK

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ADDITIONAL QUESTIONS PRESENTED

Depending on how the Court resolves the standing issues raised by Petitioners, this case also presents the following questions:

- Does Measure 16 violate the Equal Protection Clause of the Fourteenth Amendment?

- Does Measure 16 violate the Due Process Clause of the Fourteenth Amendment?

- Does Measure 16 violate the Free Exercise Clause or the Establishment Clause of the First Amendment?

Introduction

The Court should deny review, because the standing issues the petition presents are not novel or recurring. If, however, the Court grants review, and if it concludes that Petitioners have standing, it should proceed to decide the case on the merits, rather than remand to the Court of Appeals.

Argument

This Court is a law-developing, not law-applying, forum. Its job is to announce new rules of law for the lower courts to apply to recurring facts. This case, by comparison, involves the straightforward application of settled rules to peculiar facts.

One of these rules is that a person must have "standing" to seek relief in federal court. Another is that standing requires an "injury in fact" -- "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical . . . ." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and footnote omitted). Applying these rules, the Court of Appeals held that Petitioners lack standing to challenge Oregon's assisted-suicide law, known popularly as Measure 16. *Lee v. Oregon*, 107 F.3d 1382 (9th Cir. 1997).

Petitioners do not challenge the standing requirement or the requirements for standing, which the Court reaffirmed as recently as three months ago. *See Raines v. Byrd*, 117 S.Ct. 2312, 2317 (1997), and *Bennett v. Spear*, 117 S.Ct. 1154, 1161 and 1163

(1997). Instead, they challenge the lower court's application of those settled rules to their unique, not-likely-to-recur claim.

Their claim is unique, because the law they challenge is. As the Court recently observed, "[i]n almost every State -- indeed, in almost every western democracy -- it is a crime to assist a suicide." *Washington v. Glucksberg*, 117 S.Ct. 2258, 2263 (1997). Oregon is the one American exception. The voters here approved Measure 16 in 1994 after similar initiatives failed in Washington and California. Since that vote

> "many proposals to legalize assisted-suicide have been and continue to be introduced in the States' legislatures, but none has been enacted. And just last year, Iowa and Rhode Island joined the overwhelming majority of States explicitly prohibiting assisted-suicide."

Id. at 2266. Meanwhile, Congress passed -- and the President signed -- the Assisted Suicide Funding Restriction Act of 1997, 42 U.S.C. § 14401 *et seq.*, which prohibits the use of federal funds in support of aid-in-dying, and makes it even less likely that other states will follow Oregon's lead in this area anytime soon.

Because no other state has a law like Measure 16 or seems likely to enact one, a ruling by this Court on what it takes to challenge such legislation would be of little concern to anyone but Oregonians. And even they might soon lose interest, because the law itself may go away or change form in the near future. The Oregon legislature has just put Measure 16 back on the ballot in November 1997. Ore. H. B. 2954 (1997). Voters will be asked then whether to repeal the measure, which, because of the District Court's injunctions in this case, has never been implemented. Even

if Measure 16 survives that vote, it might not emerge intact from the next legislative session. The legislators may -- and probably will, proponents and opponents agree -- amend the law when they next meet. Those amendments may even resolve some of these petitioners' concerns.

This busy court should not spend its valuable time deciding whether Petitioners are entitled, under well-established standing rules, to challenge a law that is not only one-of-a-kind, but has not yet -- and may never -- take effect. The Court should, instead, save review for issues that are unsettled and recurrent. Since the issues here are neither, the Court should deny the petition.

If, instead, the Court grants review, and if, on review, it concludes that Petitioners have standing, it should proceed to decide their claim on the merits, rather than remand to the Court of Appeals. A remand is, of course, the usual practice when the Court overturns a lower court ruling that did not reach the merits. But there have been exceptions to that general rule, *see, e.g., Quinn v. Millsap*, 491 U.S. 95, 106-07 (1989), and this is an exceptional case, because two of the parties might not survive a remand. Petitioner Elsner is terminally ill.[1] So is Respondent Shuck.[2] For them, time is of the essence, and a remand means delay.

These litigants aside, there are, no doubt, many other Oregonians who are terminally-ill and who, like Respondent Shuck,

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[1] The District Court found she is, Pet. App. 59a, and the Court of Appeals assumed she is, *id.* at 10a.

[2] Pet. App. 10a. Two other parties died during the proceedings below -- plaintiff Dutson, while the case was in the trial court, *id.* at 7a, n. 1, and intervenor Vernon, while it was in the Court of Appeals.

want the comfort and protection of Measure 16. They, like he, might not have time for a decision on remand (and another, inevitable cert petition). For their sake and his, the Court should take all of this case -- standing and merits -- if it takes any of it, and thus resolve, sooner, not later, whether Measure 16 is constitutional.

For the same reason, the Court should rule promptly on the cert petition, instead of waiting until after the November plebiscite, as Petitioners propose in their "Motion to Defer Consideration of Petition For A Writ of Certiorari."

Conclusion

The Court should deny review. But if it grants review, it should direct briefing on the merits, as well as on the standing issues raised in the Petition.

Respectfully submitted,

Thomas M. Christ
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September 2, 1997